case could be disposed off easily and without difficulty once the High Court has decided on the questions; and in any event these questions cannot be disposed off satisfactorily or at all at the inquiry before the magistrate. He did not say why the questions cannot be disposed off satisfactorily at the inquiry. The reason, in my judgment, was clearly to circumvent the law. It is common knowledge that in this country magistrates or presidents of the subordinate courts would respectfully defer to any judicial pronouncement by the High Court. To ask the High Court to decide on the various legal contentions was to put the magistrate or the president in the difficult situation of having to decide for himself on these legal contentions. A much stronger reason or motive was to delay the inquiry proceedings before the magistrate. The first sign of an attempt to delay the proceedings was the filing of the notice of motion. The appellant failed in the attempt. He now complains that he is not satisfied with the answers given by the learned Chief Justice. It may well be that further attempts will be made by taking this matter further. All in all there is every reason to think that the originating summons filed in the High Court was not a *bona fide* attempt to seek a legal remedy from the court. The failure to state the nature of the rights to be declared is clear indication that proceedings were commenced in the High Court solely for the purpose of circumventing the law. That was the main reason for the preliminary objection raised by the respondent. I am satisfied that it is a valid reason and on that score alone the originating summons should have been dismissed. The reasons given by the learned Chief Justice for dismissing the application may perhaps be different from mine. On that ground I do not propose to express any opinion on the answers given to the various questions raised by the appellant. Perhaps the learned Chief Justice should not have answered the questions at all having indicated in his judgment that he was deciding on the preliminary objection. The fact remains that the questions have been answered and to that extent it is possible to argue that the application was dismissed on the merits. Either way it makes little or no difference for I am of the considered opinion that it is an application which should not be entertained by the court.

Appeal dismissed.

Solicitors: *Chin & Fernandez.*

NG ENG KOOI & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Criminal Appeal No. X.3 of 1967]

Customs and Excise — Quantum of proof on accused under Customs Ordinance, 1952, ss. 115 & 131(2).

Evidence — Customs and excise — Onus of proof on accused persons — Customs Ordinance, 1952, ss. 115 & 131(2).

The two appellants were charged with being knowingly concerned in conveying prohibited goods to wit 50 bags of rice which could not be imported except under licence, with intend to evade the prohibition applicable to such goods, an offence contrary to section 13 (1) (c) of the Customs Ordinance, 1952. As regards the question of whether the rice was prohibited goods, the prosecution had to prove that it had been brought at some time from outside Malaysia and that there was no licence for its import, and to do so they were entitled to invoke the assistance of section 115 of the Ordinance. The effect of section 115 was that there was cast on the accused the burden of proving either that the rice had not been brought from outside Malaysia or that its import was under licence. The prosecution had to prove also that each of the accused knew that the rice was prohibited goods, in the sense that it had been imported without a licence. As to this, there was a presumption in favour of the prosecution under section 131 (2) of the Ordinance. On the evidence adduced and with the aid of the provisions of sections 115 and 131 (2) of the Ordinance, the prosecution had made out against the accused a case which if unrebutted would warrant their conviction. The learned president therefore called upon them to enter their defence. The defence was a simple one, namely that the rice had not been brought from outside Malaysia. The learned president found that the accused had not discharged the burden of proof under section 115, nor had they been able to satisfy the court to rebut the presumption under section 131 (2). He found them guilty, convicted and fined each of them $5,000 or nine months imprisonment in default, and forfeited the lorry and the rice. He was upheld by Yong J., who subsequently on the application of the accused, under section 66 of the Courts of Judicature Act, reserved the following question of law for the decision of the Federal Court:

> "Whether the quantum of proof on an accused person to discharge the onus placed on him by section 115 and/or section 131 (2) of the Customs Ordinance, 1952, should be —
>
> (a) to the satisfaction of the court, or
>
> (b) on the balance of probabilities, or
>
> (c) to raise a reasonable doubt."

Held: (1) where an enactment expressly provides that a particular fact shall be presumed or deemed to exist "unless the contrary is proved" it is unnecessary for the defendant to prove whatever he has to prove beyond reasonable doubt, for all that he has to do is to satisfy the court on a balance of probabilities that it is more likely than not that the fact which he seeks to prove or disprove exists or does not exist, as the case may be. In other words, the burden which lies on him is the same as that which lies on a successful party in civil proceedings;

(2) the distinction between "satisfaction on a balance of probabilities" and "satisfaction beyond reasonable doubt" is well established in the law, since the courts always stress, when the onus of proof is on the accused (for example, where he raises the defence of insanity, or where some statute puts the onus on him) that he need satisfy the jury only on the balance of probabilities, which is lesser than the onus on the prosecution, namely satisfaction beyond reasonable doubt. Taking the words "satisfaction of the court" to mean "satisfaction on the balance of probabilities" it would seem clear that question (a) in this reference can be equated with question (b);

(3) the mere expression "to the satisfaction of the court" is unsatisfactory when referring to the degree of proof required of a defendant in prosecutions under the Customs Ordinance;

(4) in order to rebut the presumption under section 131 (2) of the Customs Ordinance the accused in the present case had to prove on the balance of probabilities that the 50 bags of rice did not come within the category of "dutiable" or "uncustomed" or "prohibited" goods;

(5) under section 115 of the Customs Ordinance the fact that the rice in question had not been lawfully imported is presumed unless the contrary is proved, although the section does not say so in so many words;

(6) the quantum of proof required of a defendant is the same whether it is a question of introducing evidence to rebut a presumption or introducing evidence to prove that which is required to be proved. The quantum of proof in either

case is proof on the balance of probabilities as in civil proceedings;

(7) in this case the learned president probably misdirected himself in applying *Public Prosecutor* v. *Fatimah*.(1) The effect of that would therefore be that he had failed to direct his mind properly on the law as to quantum of proof placed on the defence in such a case as the instant one. However, that failure to direct his mind properly on the question of law had not occasioned any substantial miscarriage of justice because he had rejected the evidence of each of the witnesses produced by the defence *in toto* and in so doing had applied the correct principle.

Cases referred to:-

(1) *Public Prosecutor* v. *Fatimah* [1960] M.L.J. 109.

(2) *Public Prosecutor* v. *Yuvaraj* [1968] 1 M.L.J. 238, F.C.

(3) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89, P.C.

(4) *R.* v. *Gaunt* [1964] Cr. Law Review 781.

(5) *R.* v. *Cohen* [1951] 1 All E.R. 203.

(6) *Kee Kim Chooi & Ors.* v. *Public Prosecutor* [1952] M.L.J. 180.

(7) *Lee Guek Hon* v. *Public Prosecutor* [1953] M.L.J. 17.

(8) *Looi Teik Lan* v. *Public Prosecutor* [1961] M.L.J. 12.

(9) *Public Prosecutor* v. *Abdul Manap* [1956] M.L.J. 214.

(10) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337, 340.

FEDERAL COURT.

Dato' David Marshall (*T. C. Tang* with him) for the appellants.

K. Somasundram (Sr. Federal Counsel) for the respondent.

Cur. Adv. Vult.

Azmi L.P. (delivering the judgment of the court): This is a reference by the High Court under section 66 of the Courts of Judicature Act, the question reserved for the decision of this court being —

"whether the quantum of proof on an accused person to discharge the onus placed on him by section 115 and/or section 131(2) of the Customs Ordinance, 1952, should be —

(a) to the satisfaction of the court, or

(b) on the balance of probabilities, or

(c) to raise a reasonable doubt."

The two appellants were charged with being knowingly concerned in conveying prohibited goods (the prohibited goods being 50 bags of rice which by virtue of L.N. 624/1954 could not be imported except under licence) with intent to evade the prohibition applicable to such goods, an offence contrary to section 131(1)(e) of the Customs Ordinance No. 42 of 1952.

The evidence produced by the prosecution in support of the charge was that on 14th May, 1966 at about 12.00 noon customs superintendent Ahmad bin Abdullah (P.W. 1) and customs officer Ahmad Jallaluddin bin Mohamed Ismail (P.W. 2), in the course of their border patrol, found the lorry mentioned in the charge parked outside the Berjaya Store at Padang Besar. It was empty and there was no driver or attendant in or around it. Inside the store they found some rice bran and rice vermicilli but no rice. The owner of the store, a man called Abdullah, upon being questioned, told them that the driver and cleaner of the lorry had gone to Pekan Siam. They remained at this store until 7.30 p.m. up to which time no one came to drive the lorry away. Thereafter and until 7.30 a.m. on the following morning customs officers Mohamed Hambali bin Mat Saman (P.W. 5) and Othman bin Yahaya (P.W. 6), on the instructions of P.W. 1, remained near the store and kept watch over the lorry. During the whole of that period they did not see anything being loaded into the lorry.

On 15th May, 1966 at about 8.00 a.m. Mohamed Sani bin Hassan (P.W. 3), assistant superintendent of customs at Padang Besar, was in an ambush position at the railway level crossing at Padang Besar when he saw the same lorry coming from the direction of Padang Besar and going towards Kangar. He stopped the lorry and having identified himself to the appellants, who were the driver and the attendant respectively of the lorry, detained and examined the lorry which was found to contain 50 gunny sacks. Upon being questioned, the first appellant informed P.W. 3 that he was carrying 50 gunny sacks of rice, but he could not produce any documents relating to the rice. P.W. 3 then took the lorry and the appellants to the customs office at Padang Besar. At about 11.00 a.m. he informed P.W. 1 about the detention of the lorry and of the two appellants. P.W. 1 arrived at Padang Besar at about 12.30 p.m., took over custody of the lorry together with the 50 bags of rice, had the appellants put under arrest and lodged a report at Padang Besar police station *vide* Report No. 220/66. On the same day one Teoh Teng Hai, proprietor of Chop Hai Thong of Sungei Patani, claimed the rice to be his.

Nik Salleh bin Nik Mat, assistant controller of supplies, Penang, Kedah and Perlis (P.W. 4), gave evidence to say that there was no rice dealer in Padang Besar, and that according to his records Chop Hai Thong was licensed to deal in rice in Sungei Patani and Permatang Pauh in Province Wellesley. He further testified that Chop Hai Thong submitted lists of purchase and sale of rice to the controller of supplies, Kuala Lumpur who in turn forwarded them to him. He went on to say that, according to two such lists received by him for forwarding to the customs department, for a period of one month prior to 14th May, 1966 no rice had been sold by Chop Hai Thong to any shop in Padang Besar.

We would pause here to observe that the prosecution had to prove three things against each of the accused:

(1) that he was knowingly concerned in conveying a quantity of rice;

(2) that the rice was prohibited goods in the sense alleged in the charge, that is, that it had been imported without a licence; and

(3) that he knew that the rice was prohibited goods in the sense charged, that is, that it was imported rice and that its import was not covered by a licence.

The learned president considered P.W. 5 and P.W. 6 to be unreliable witnesses, but taking the evidence for the prosecution as a whole it was abundantly clear (indeed there was never any dispute) that the lorry in question was empty when it was first found

parked outside Berjaya Store, that there was rice on the lorry when it was stopped by the customs on the following morning not far from the Thai border, and that it was there with the accused's knowledge and approval. The first of the matters to be proved by the prosecution was therefore clearly proved.

As regards the question of whether the rice was prohibited goods, the prosecution had to prove that it had been brought at some time from outside Malaysia and that there was no licence for its import, and to do so they were entitled to invoke the assistance of section 115 of the Ordinance which reads —

"If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovery of any penalty or penalties under this Ordinance, any dispute arises whether the customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or exported or lawfully landed or loaded, or concerning the place whence such goods were brought or where such goods were loaded, or whether anything is exempt from duty under the provisions of section 13 of this Ordinance, then and in every such case the burden of proof thereof shall lie on the defendant in such prosecution."

That section clearly applied, for the prosecution was one for penalties under the Ordinance and when the accused claimed trial, as they did, the effect of their so doing was to put in dispute every material allegation in the charge against them, including the allegation that the rice had been brought from outside Malaysia and there was no import licence in respect thereof. The effect of section 115 then was that there was cast on the accused the burden of proving either that the rice had not been brought from outside Malaysia or that its import was under licence.

Thirdly, the prosecution had to prove that each of the accused knew that the rice was prohibited, in the sense that it had been imported without a licence. As to this, there was a presumption in favour of the prosecution under section 131(2) of the Ordinance which provides —

"Without prejudice to the generality of section 106 of the Evidence Ordinance, in any prosecution under this section or section 135 of this Ordinance any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

It was clear that, on the evidence adduced and with the aid of the provisions of section 115 and 131(2) of the Ordinance, the prosecution had made out against the accused a case which if unrebutted would warrant their conviction. The learned president therefore called upon them to enter their defence.

The case for the defence briefly was that on the morning of 14th May, 1966 the two accused (D.W. 1 and D.W. 2), on the instructions of their employer Teoh Teng Hai (D.W. 5), the proprietor of Chop Hai Thong, given in the presence of his clerk Tan Kim Hong (D.W. 4), took the 50 bags of rice in the lorry in question from the godown of Chop Hai Thong at Sungei Patani to Padang Besar where it was to be sold by the said Tan Kim Hong. Their instructions from D.W. 4 were to take the rice to the house of one Kaliappan (D.W. 3) and await his arrival. Upon their arrival at Kaliappan's house the engine of the lorry stalled and would not start, whilst they were reversing it, whereupon with Kaliappan's permission they unloaded the 50 bags of rice into the house and with the help of two male Malays pushed the lorry in order to start the engine. As the engine did not start they were obliged to park the lorry outside the Berjaya Store after which they went to Padang Besar town where they were met by D.W. 4 to whom they related the story about the lorry having broken down. They were instructed to look for a mechanic to repair the lorry, but as they were unable to find a mechanic in the town D.W. 4 decided to go back to Sungei Patani, without making any attempt to sell the rice and giving them instructions to drive the lorry back to Sungei Patani as soon as it was repaired. In the event of their being unable to get the lorry repaired they were to get in touch with him at Sungei Patani, so that he could send another lorry to take the rice back. Because their further efforts to start the engine were fruitless, they slept in the lorry that night. Having succeeded in getting the engine started on the following morning, they loaded the rice back into the lorry and proceeded to drive it back to Sungei Patani when they were stopped by P.W. 3 at the railway level crossing at Padang Besar.

It emerged from the evidence for the defence that it was not the practice of Chop Hai Thong to carry goods to various places and then canvass for buyers, and that this was done for the first time on 14th May, 1966 because the business of the Chop was not good. The evidence of the first accused was that it was usual for an invoice to be carried with the goods but that no invoice was given to him for the 50 bags of rice. The evidence of Kaliappan (D.W. 3) was that he was not expecting any goods from Chop Hai Thong in Sungei Patani on 14th May, 1966. Tan Kim Hong (D.W. 4) testified that his duty as a salesman was to sell the rice to any buyer he could find, irrespective of whether such prospective buyer was or was not a licensed dealer in rice, and that he was unable to find a buyer for the rice because the lorry had broken down. Teoh Teng Hai (D.W. 5) stated in evidence that the 50 bags of rice were to be accounted for in his books after the rice had been sold.

In the course of his judgment the learned president dealt at great length with the evidence of each of the witnesses for the defence, and having discussed that evidence made certain findings of fact. He found D.W. 1 to be a self contradictory and unreasonable witness whose evidence on the material points he found to be inherently improbable. He found D.W. 2 also to be a self contradictory and unreliable witness and a witness who had contradicted D.W. 1 on material particulars. Of Kaliappan (D.W. 3) he said: "At the end of his whole evidence, under the above circumstances and from his unimpressive demeanour in the witness box which clearly showed he was ill at ease, I could not help regarding him as an unreliable witness." The evidence of D.W. 4 on the material particulars he found to be inherently improbable. Of D.W. 5 the learned president said that his evidence seemed clearly to show that the 50 bags of rice never came out of his stock at Sungei Patani.

It is to be observed that the defence was a simple one, namely, that the rice had not been brought from outside Malaysia at all, that originally it was sent from Sungei Patani to near the Thai border for sale there, and that there being no sale it was being brought back to Sungei Patani when the lorry was stopped by the customs officers. It is further to be observed that the effect of sections 115 and 131(2) was to shift the onus of proof of these facts from the prosecution (on whom it would otherwise lie) to the accused. The question was: what was the quantum of proof necessary to discharge the onus thus put on the accused?

The learned president held on the authority of *Public Prosecutor* v. *Fatimah*[1] that the effect of section 115 was that once the customs officer found that both accused were knowingly concerned in conveying the rice he could take them to court and *make them prove* that the rice had been lawfully imported and/or rebut the presumption under section 131(2) that they knew that the rice was not prohibited goods, and that in the latter case the accused must prove to the satisfaction of the court that they did not know that the rice had not been lawfully imported or that they did not know that they were prohibited goods.

After examining the evidence the learned president found that the accused had not discharged the burden of proof under section 115, nor had they been able to satisfy the court (as required by *Fatimah's* case) to rebut the presumption under section 131(2). He found them guilty, convicted and fined each of them $5,000 (or 9 months) and forfeited the lorry and the rice. He was upheld on appeal by Yong J., who subsequently at the request of the accused under section 66 of the Courts of Judicature Act, referred to this court the question which is now before us.

When this reference first came up before us on 6th February, 1968, we adjourned it because a similar question was pending before another panel of this court in *Public Prosecutor* v. *Yuvaraj*[2] involving a presumption under section 14 of the Prevention of Corruption Act. On 19th February judgment was given in that case to the effect that where by statute some matter is presumed against an accused person, the burden of rebutting the presumption is discharged by a defence which is reasonable and probable. In delivering the judgment of the court Ong F.J. (as he then was) said at page 242:

"If 'proof' were held to imply satisfaction to the point of belief in the very existence of a fact, instead of belief in the reasonable probability of its existence, then there can be no practical difference between the quantum of proof required of the defence and that laid on the prosecution. We do not think that is the law."

Eventually this matter reached the Privy Council, whose advice has since been reported.[3]

In the *Yuvaraj* case[2] the defendant was charged with accepting a gratification contrary to section 4(1) of the Prevention of Corruption Act, 1961, and the prosecution had to prove three factual ingredients. They proved (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body (namely, the Federal Government). In those circumstances section 14 of the Act came into operation. That section provides that —

"Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved."

Thus it was for the defendant to disprove the third necessary ingredient, namely, a corrupt motive. The learned president found that the defendant had proved the absence of a corrupt motive and therefore acquitted him. On appeal he was upheld by the High Court, and both this court and the Privy Council affirmed the decision of the High Court.

It is to be observed that the appeal which went to the Privy Council in *Yuvaraj's* case[3] turned on the construction of the words "unless the contrary is proved" in section 14 of the Prevention of Corruption Act, 1961. Lord Diplock delivering the opinion of the Board said at page 91:

"The Evidence Ordinance applies to civil and to criminal proceedings alike and the definitions (in section 3) of "proved" and "disproved" draw no explicit distinction between facts required to be proved by the prosecution in criminal proceedings and facts required to be proved by a successful party to civil proceedings. Yet it cannot be supposed that the Evidence Ordinance intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction fundamental to the administration of justice under the common law, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities."

Turning specifically to the presumption under section 14 Lord Diplock, said at page 92:

"Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'.. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence shall be presumed or deemed to exist 'unless the contrary is proved.' In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities."

Thus it will be seen that according to the Privy Council where an enactment expressly provides that a particular fact shall be presumed or deemed to exist "unless the contrary is proved" it is unnecessary for the defendant to prove whatever he has to prove beyond reasonable doubt, for all that he has to do is to satisfy the court on a balance of probabilities that it is more likely than not that the fact which he seeks to prove or disprove exists or does not exist, as the case may be. In other words, the burden which lies on him is the same as that which lies on a successful party in civil proceedings.

As far as question (a) in this reference is concerned, it is to be pointed out that the words "satisfaction of the court" can mean one of two things. First, they can mean, "satisfaction on a balance of probabilities" and, secondly, "satisfaction beyond reasonable doubt" (see *R.* v. *Gaunt*[4]). However, the distinction between "satisfaction on a balance of probabilities" and "satisfaction beyond reasonable doubt" is well established in the law, since the courts always stress, when the onus of proof is on the accused (for example, where he raises the defence of insanity, or where some statute puts the onus on him) that he need satisfy the jury only on the balance of probabilities, which is lesser than the onus on the prosecution, namely satisfaction beyond reasonable doubt. Taking the words "satisfaction of the court" to mean "satisfaction on the balance of probabilities" it would seem clear that question (a) in this reference can be equated with question (b).

It is clear that the expression "to the satisfaction of the court" was taken by the learned president from the judgment in *Fatimah's* case.[1] We have looked at that judgment where Hepworth J. said simply that in the circumstances of that case the accused (who was charged with being knowingly in possession of uncustomed goods) had "to prove to the satisfaction of the court" that the duty had not been paid. He did not say whether the accused had to satisfy the court beyond reasonable doubt, or on a balance of probabilities or by raising a reasonable doubt in the case for the prosecution. It is therefore plain that the use of the mere expression "to the satisfaction of the court" is unsatisfactory when referring to the degree of proof required of a defendant in prosecutions under the Customs Ordinance.

It was submitted by Dato' Marshall on behalf of the appellants that the *ratio decidendi* of *Yuvaraj*[3] is not applicable to customs cases because they are not analogues to corruption cases, and that in customs cases, on the authority of *R.* v. *Cohen*[5] which has been followed by the courts in this country in *Kee Kim Chooi and Others* v. *Public Prosecutor*;[6] *Lee Guek Hon* v. *Public Prosecutor*[7] and *Looi Teik Lan* v. *Public Prosecutor*,[8] it is enough for an acquittal if the accused raises a doubt. In that case Goddard L.C.J. said at page 206:

"... counsel for the Crown was right in his submission that these cases are closely analogous to those of receiving stolen goods when the evidence relied on for the prosecution is merely possession of goods recently stolen. That has always been held to be *prima facie* evidence of guilty knowledge, or, in other words, to raise a presumption of guilt, so that if no explanation is given by the receiver the jury are entitled though not compelled, to convict. On the other hand, if the explanation given either satisfies the jury or raises a doubt in their minds as to the guilty knowledge, the defendant is entitled to an acquittal. A case is never proved if the sum of the evidence leaves the jury in doubt. So, in the present class of case, once it is proved that the accused was knowingly in possession of dutiable goods which he has not proved had paid duty, if he gives no explanation, he may be convicted of harbouring. If he does give an explanation, the jury should be told that if it either satisfies them that he did not know the goods were uncustomed or leaves them in doubt whether he knew, he should be acquitted."

The short answer to this submission is that *R.* v. *Cohen*[5] is not binding on us, but *Public Prosecutor* v. *Yuvaraj*[3] is. We do not think there can be any basis for an argument that the presumption under section 131(2) of the Customs Ordinance 1952 is not identical with the presumption under section 14 of the Prevention of Corruption Act 1961, the emphasis in both sections being on the words "unless the contrary is proved." As to the quantum of proof, the question has now been answered by their Lordships of the Privy Council in *Public Prosecutor* v. *Yuvaraj*.[3] Applying with respect the opinion in that case, we can say at once that in order to rebut the presumption under section 131(2) of the Customs Ordinance the two accused in the present case had to prove on the balance of probabilities that the 50 bags of rice did not come within the category of "dutiable" or "uncustomed" or "prohibited" goods.

As regards section 115 of the Customs Ordinance, Dato' Marshall's argument is that in the context of *Yuvaraj's* case the quantum of proof under that section is radically distinct from the quantum of proof required to rebut the presumption under section 131(2) of the Customs Ordinance. We can find no substance in that argument, because in our judgment the words "unless the contrary be proved by such defendant" in section 131(2) and the words "the burden of proof required thereof shall lie on the defendant" in section 115 mean one and the same thing. To elaborate, under section 14 of the Prevention of Corruption Act, which is in *pari materia* with section 131(2) of the Customs Ordinance, a corrupt motive is presumed unless the contrary is proved. Similarly, under section 115 of the Customs Ordinance the fact that the rice in question had not been lawfully imported is presumed unless the contrary is proved, although the section does not say so in so many words. But for that section the prosecution would have to prove that the rice had been unlawfully imported. Because of the section it is for the accused to prove that it had not been unlawfully imported. This is only another way of saying that it shall be presumed that the rice had been unlawfully imported unless the contrary is proved.

The basis of this argument by Dato' Marshall is that the phrase "the burden of proof thereof shall lie on the defendant" in section 115 means no more than "burden of introducing evidence" or "evidential burden" as Professor Glanville Williams calls it in his book on Criminal Law, The General Part, 2nd edition, paragraph 287, page 876. The short answer to that is that "burden of proof" not only means the duty of introducing evidence but also proving by that evidence whatever the defendant is required to prove. In our judgment, it is clear from the authorities that the quantum of proof required of a defendant is the same whether it is a question of introducing evidence to rebut a presumption or introducing evidence to prove that which is required to be proved. The quantum of proof in either case is proof on the balance of probabilities as in civil proceedings.

It was next submitted by Dato' Marshall that the quantum of proof indicated by their Lordships of the Privy Council is incongruous in that it gives a higher status to a presumption of law than to actual facts. By way of example, he said that if the police search a person and find him with a tobacco pouch with to-

bacco in it, they can charge him for being in possession of uncustomed goods and the onus is on him under section 131(2) of the Ordinance to prove on a balance of probabilities that duty has been paid on the tobacco or that he does not know that duty has not been paid, whereas if a person is charged with far graver crimes such as treason, murder or fraud, all that he has to do is to raise a reasonable doubt in the prosecution case. He further said that the said quantum of proof has now introduced in this country two different measures of quantum of proof on an accused person at the close of the prosecution case, which if unrebutted, must result in a conviction, namely,

(a) to raise a reasonable doubt where the prosecution case is made out on facts and legitimate inferences therefrom, and

(b) to prove on a balance of probabilities where a statutory presumption is raised against him "unless the contrary is proved."

This distinction in the quantum of proof, he submitted, seems to be contrary to elementary commonsense and unnecessary.

With great respect to Dato' Marshall, that distinction in the quantum of proof has always been there, and law is not always or solely a matter of elementary commonsense. As for his suggestion that to follow the test laid down by *Yuvaraj*[3] would cast on the defence a heavier burden than having merely to raise a reasonable doubt in the prosecution case, this very suggestion was put before the Privy Council in *Yuvaraj* and it was rejected by Lord Diplock at page 92 as follows:

"It has been suggested that to satisfy the court that upon the balance of probabilities a fact does not exist puts too high a burden upon a defendant in criminal proceedings where the consequence of a failure to disprove that fact would be his conviction; and in some of the cases cited by the Federal Court without explicit disapproval expressions are used which might be understood as calling for an explanation by the defendant of no greater degree of plausibility than is sufficient to raise a reasonable doubt in the existence of the fact which he must disprove. But this is the test by which in the absence of any statutory provision reversing the burden of proof the court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been 'proved' or 'not proved' by the prosecution upon whom the onus lies to prove it. It is merely another way of saying that the prosecution must not only prove the existence of the first two factual ingredients of the offence, *viz.* (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift, or receipt he was in the employment of a public body, but must also satisfy the court that the circumstances in which the gratification was paid, given or received give rise beyond reasonable doubt to an inference of fact that it was paid, given or received with a corrupt motive. This is the ordinary way in which the prosecution satisfies the burden of proving the motive with which an act was done by the defendant where the onus of doing so lies upon the prosecution. In their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist 'unless the contrary is proved'."

Thus it is clear that to allow the accused in this case to discharge the burden placed on them by section 115 of proving that the rice had not come from outside Malaysia without a licence and by section 131(2) that he did not know it was prohibited goods, by merely raising a reasonable doubt in the prosecution case, would not be giving sufficient effect to the reversal of the ordinary onus of proof by the two sections.

To sum up, the answer to the question posed is that the quantum of proof on an accused person to discharge the onus placed on him by section 115 and/or section 131(2) of the Customs Ordinance, 1952 should be proof on a balance of probabilities.

That answer, however, does not dispose of the appeal, as we have next to consider whether the learned president in convicting the appellants applied the right test as to the quantum of proof. His reasons for convicting them, which we have mentioned earlier, are contained in the following passage in his judgment:

"At the close of the case for the defence after listening to the submissions of both the defence counsel and the prosecuting officer, it seemed to be clear under the circumstances as above explained that the defence had not discharged the burden of proof under section 115 of the Customs Ordinance nor had it been able to satisfy the court as held by Hepworth, J., in *Fatimah's* case above quoted (by analogy therefrom) to rebut the presumption under section 131 (2) of Customs Ordinance."

Our attention was directed to the words "nor had it been able to satisfy the court on the principle held by Hepworth J. in *Fatimah's* case" appearing in the above extract from the learned president's judgment, and it was argued that in so stating the position the learned president had in fact intended to mean that the defence had failed to satisfy him "beyond reasonable doubt" because earlier in his judgment he had rejected the case of *Public Prosecutor* v. *Abdul Manap*[9] as being irrelevant. In that case, Briggs J. was considering the case of the accused's right of private defence. At the conclusion of the judgment, after setting out the facts of the case, he stated this:

"....and if on consideration of the whole of the prosecution evidence it appears more probable than not that the accused acted properly in the exercise of his right of private defence the court has no alternative but to acquit him without calling for his defence. It may be that if he gave evidence the matter would be much more clearly and satisfactorily disposed of in the sense that doubtful issues of facts might have cleared up. I am, however, after considerable thought, of opinion that the evidence given for the prosecution makes it appear to me much more probable than not that the accused did act in private defence and did not do so excessively."

We have read the judgment of Briggs J. most carefully. In our view what Briggs J. intended to convey was no more than this: that in considering the defence of the right of private defence the court may do so wholly on the evidence produced by the prosecution. Thomson C.J. (as he then was) in *Looi Wooi Saik* v. *Public Prosecutor*[10] said something to the same effect when he was dealing with the defence of provocation. This is what he said:—

"In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation."

It is interesting to note that in the same judgment, Thomson C.J. made it very clear that what he was saying in that case has no application to the question

of insanity as a defence. We think that we should cite the whole passage:

"The question in the present appeal is the way in which a jury should be directed in a case of murder where one of the special exceptions or one of the general exceptions has been put forward as a defence. And here let me say that nothing that is said here is to be taken as having any necessary application to the question of insanity as a defence. That is a defence which has been generally regarded as standing in a class of its own, and in the present case we have excluded it from our consideration."

It will be noticed from the above two passages that Thomson C.J. intended to say, first, that the principle laid down in that judgment would equally apply to any of the general exceptions put forward as a defence, and that therefore that principle applies to a case of self-defence. Secondly, he also stressed that what he was saying in that judgment was not intended to apply to a defence of insanity.

The learned president in the present case declined to apply the principle in the *Abdul Manap's* case[9] merely because in his view that case dealt with self-defence under the Penal Code and not with a specific presumption under the Customs Ordinance. He did not go on to say that he did not accept the principle laid down by the learned judge in relation to the question of self-defence.

Going back to *Fatimah's* case, we can find nothing in Hepworth J's judgment in that case to suggest that he used the words "proof to the satisfaction of the court" to mean "proof beyond reasonable doubt," nor can it be said that he intended to lay down any principle as to the quantum of proof placed on the defence to rebut a presumption, since he was merely considering the questions as to whether on the facts disclosed by the prosecution there was a case for the defence to answer. We agree, however, that if in the present case the learned president, in following *Fatimah's* case, convicted the appellants on the ground that they had failed to prove their case beyond reasonable doubt, especially when nowhere in his grounds of decision did he use the words "balance of probabilities," as pointed out by Dato' Marshall, he misdirected himself as to the quantum of proof required of them.

We have already stated the findings of fact which the learned president made with regard to the evidence of each of the witnesses for the defence. He did so after a very careful analysis of the evidence, and he rejected the evidence of each one of them either on the ground that the witness was unreliable because his evidence appeared improbable to him or because of his demeanour in the witness box. In our view, therefore, he had the right test in mind when he said that the defence had not discharged the burden of proof under section 115 of the Customs Ordinance or rebutted the presumption under section 131(2) of the Ordinance. His findings on questions of fact on the evidence before him have not been challenged in this court, and in our judgment they are unassailable. Where a court says of the defence evidence that it is improbable and/or unreliable, we do not see how it can possibly be said that on that evidence the defence had proved its case on a balance of probabilities or had even raised a reasonable doubt as to the prosecution case.

As we have said, we agree that the learned president probably misdirected himself in applying *Fatimah's* case. The effect of that would therefore be that he had failed to direct his mind properly on the law as to quantum of proof placed on the defence in such a case as the instant one. In our view, however, that failure to direct his mind properly on the question of law has not occasioned any substantial miscarriage of justice because he had rejected the evidence of each of the witnesses produced by the defence *in toto* and in so doing had applied the correct principle.

The order as regards the disposal of the appeal would be that it do stand dismissed.

Appeal stand dismissed.

Solicitors: *T. C. Tang & Co.*

KIAN HIN & CO. LTD. v. KAN YEOW WING

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 85 of 1969]

Contract — Sale of land and house — Deposit paid — Balance of purchase price unpaid — Rescission of contract — Whether interest payable on balance of purchase price.

The appellants sold a house to the respondent. The respondent entered into possession of the house but did not pay the balance of the purchase price. The appellants sued the respondent and obtained judgment for possession of the house and were also allowed to retain the deposit. The appellants in this appeal claimed that they were entitled to interest on the balance of the purchase price.

Held, dismissing the appeal: as the contract was treated as rescinded in this case, the appellants were not entitled to the interest claimed.

Cases referred to:-

(1) *K. Arumugam* v. *J.K.R. Leonard* [1936] M.L.J. 252.

(2) *Chajmal Das* v. *Brij Bhukan Lal & Anor.* (1895), I.L.R. 17 All. 511; 22 I.A. 199.

(3) *Fludyer* v. *Cocker* (1805), 12 Ves. Jun. 25; 33 E.R. 10.

(4) *E.F. Barber* v. *J.C. Wolfe* [1945] 1 All E.R. 399.

(5) *Hall* v. *Burnell* [1911] 2 Ch. 551.

The following cases were also cited in argument: *Farrant* v. *Olver* (1922) 91 L.J. Ch. 758, 759; [1922] All E.R. Rep. 783; *Lowe* v. *Hope* [1969] 3 All E.R. 605; *Hutchins* v. *Humphreys* (1885) 54 L.J. Ch. 650; *Essex* v. *Daniel* L.R. 10 C.P. 538, 553.

FEDERAL COURT.

Atma Singh Gill for the appellants.

Edgar Joseph Jr. for the respondent.

Cur. Adv. Vult.

Azmi L.P.: I agree that the appeal be dismissed with costs for reasons given in the judgment of my brother Suffian F.J.

Suffian F.J.: The plaintiffs, a limited liability company, are developers. They sold a terrace house at Lobak Road, Seremban, to the defendant. The price was $22,100. The defendant paid $6,323.75 by way of deposit towards the purchase price, leaving a balance of $15,776.25. Somehow or other the defendant con-